1987

Utah v. David E. Brown : Reply Brief

Utah Court of Appeals

David L. Wilkinson; attorney general; Dan R. Larsen; assistant attorney general; attorneys for repsondent.
Frances M. Palacios, Joan C. Watt, Richard G. Uday; Salt Lake Legal Defender Assoc.; attorneys for appellant.

DOCKET NO. 870504-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
DAVID E. BROWN	:	Case No. 870504-CA Priority No. 2
Defendant/Appellant.	:	

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for Theft, a third degree felony, in violation of Utah Code Ann. §76-6-404 (1953 as amended), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Pat B. Brian, Judge, presiding.

FRANCES M. PALACIOS
JOAN C. WATT
RICHARD G. UDAY
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

DAVID L. WILKINSON
ATTORNEY GENERAL
DAN R. LARSEN
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

IN THE COURT OF APPEALS OF THE STATE OF UTAH

[illegible] UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	
[illegible] UPTON	:	Case No. 870501 [illegible] Priority No. 2
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FRANCES M. PALACIOS
JOAN C. WATT
RICHARD G. UDAY
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South
Salt Lake City, Utah 84111

Attorneys for Appellant

DAVID L. WILKINSON
ATTORNEY GENERAL
DAN R. LARSEN
ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorneys for Respondent

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REPLY BRIEF

INTRODUCTION

The Jurisdictional Statement, Statement of the Case, and Statement of the Facts are set forth in Appellant's opening brief (Brief of Appellant at iv, 1-3). Mr. Brown takes this opportunity to reply to Respondent's Brief.

SUMMARY OF THE ARGUMENT

Theft crimes are not crimes of dishonesty or false statement under Rule 609(a)(2) of the Utah Rules of Evidence. Federal case law guides the interpretation of the Rules of Evidence and overwhelmingly indicates that the trial court erred prejudicially by ruling to admit prior theft convictions to impeach Mr. Brown. That ruling kept Mr. Brown from testifying on his own behalf in violation of his constitutional rights to do so.

Prejudicial error occurs when a juror fails to answer a material question on voir dire examination and later deliberates

using information which discloses the failure to have truthfully answered the voir dire question. Further, jurors may not deliberate before the case is submitted to them, nor may they presume the accused to be guilty. Reversible error occurred in Mr. Brown's case when the trial court refused to acknowledge the above errors and denied Mr. Brown's motion for a new trial, violating his due process rights and his constitutional rights to a fair trial by an impartial jury.

ARGUMENT

POINT I

(Reply to Respondent's Point I)

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING MR. BROWN'S PRETRIAL MOTION TO EXCLUDE EVIDENCE OF HIS PRIOR CONVICTIONS OF MISDEMEANOR THEFT.

The State mistakenly relies on State v. Cintron, 680 P.2d 33 (Utah 1984), for the proposition that theft crimes are crimes of dishonesty. Brief of Respondent at 7. The State v. Cintron per curiam opinion was decided under the old rules of evidence and does not reflect the new direction taken in Utah since adoption of the federal rules of evidence. Specifically, State v. Cintron is inconsistent with Rule 609's more narrow interpretation of "dishonesty." See Opening Brief of Appellant at 5-8. The Utah Supreme Court has stated that previous opinions which are inconsistent with the new direction taken since adopting the federal

rules are overruled. State v. Banner, 717 P.2d 1325, 1334 n. 40 (Utah 1986). State v. Cintron is just such an opinion and therefore should be considered overruled.

This analysis is buttressed by footnote 45 of State v. Banner where the Utah Supreme Court pointed out that the prosecutor's reliance on case law established prior to Rule 609(a) at the trial level was significant--and presumably unpersuasive on appeal. Both the Utah Supreme Court and the Utah State Bar Commission's Rules Committee's Preliminary Note to the Utah Rules of Evidence indicate a serious commitment to using the adoption of the federal rules of evidence as a fresh starting place for the law of evidence in this state, taking aim at seeking uniformity between the rules by looking to the federal rules for interpretation. State v. Banner, 717 P.2d at 1333-34. The State v. Cintron opinion violates this new direction and is inappropriately relied on by the State for its base proposition.

Mr. Brown's reliance on State v. Banner, supra, and State v. Gentry, 747 P.2d 1032 (Utah 1987), is not intended to blur the (a)(1) and (a)(2) subsections of Rule 609 as implied by the State (Brief of Respondent at 7-8); rather, both cases were cited to demonstrate the Utah Supreme Court's posture since adopting the federal rules of evidence emphasizing the Court's expressed intent to rely on federal case law to guide the evidence rules questions. In State v. Banner, the Utah Supreme Court cited United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976), for an historical perspective of the development of Rule 609(a). That historical review discloses

the congressional debate of the rule and the revisions undertaken prior to adopting the rule.

Although United States v. Smith, supra, did involve crimes other than the theft crimes at issue in this case, United States v. Smith remains persuasive in deciding whether theft crimes are crimes of dishonesty or false statement as meant by Rule 609(a)(2) because Smith speaks directly to the point of what Congress meant by the phrase, often citing the congressional record. See Opening Brief of Appellant at 7. United States v. Millings, 535 F.2d 121 (D.C. Cir. 1976), similarly offers guidance to this Court despite a difference in the specific crimes being examined. Among many cases, United States v. Seamster, 568 F.2d 188, 190 (10th Cir. 1978), directly indicates that robbery, burglary, and theft convictions are not included within the term "dishonesty or false statement" as meant by Rule 609(a)(2). See also United States v. Glenn, 667 F.2d 1269 (9th Cir. 1982), and Howard v. Gonzalez, 658 F.2d 352 (5th Cir. 1981), cited in Mr. Brown's opening brief. Opening Brief of Appellant at 8.

United States v. Smith, supra, discloses the misplaced reliance by the state to the contrary, citing United States v. Bianco, 419 F.Supp. 507 (E.D. Pa. 1976); United States v. Ackridge, 370 F.Supp. 214 (E.D.Pa. 1973); United States v. Gray, 468 F.2d 257 (3rd Cir. 1972); and United States v. Baber, 447 F.2d 1267 (D.C. Cir. 1971). Three of these four cases pre-date Congress' adoption of the federal rules of evidence. The fourth case, United States v. Bianco, supra, decided after the enactment of the federal rules,

relied only upon pre-federal rules cases. As the District of Columbia Circuit Court pointed out in United States v. Smith, supra, "[t]he simple answer to the government's argument is that none of these cases involved Rule 609." 551 F.2d at 364. The Smith court further explained that these opinions relying on pre-609 cases "are not controlling in this case and indeed are essentially irrelevant." Id. at 365. The enactment of the federal rules in 1975, and their adoption in Utah in 1983, represented significant changes in the treatment of prior convictions as impeachment evidence. The burden shifted, the judge's discretion was altered, and the analysis is distinct. Cases predating these changes therefore do not offer helpful insights. The cases relied on in the State's brief are not persuasive.

Finally, the State cites as supplemental authority a recent Washington case, State v. Brown, 111 Wash.2d 124, ___ P.2d ___ (1988), to support their premise that theft crimes are crimes of dishonesty. While State v. Brown does indicate the Washington Supreme Court's position that theft crimes are crimes of dishonesty, the opinion in toto supports the claims of our appellant, Mr. Brown.

In State v. Brown, supra, the Washington Supreme Court overruled a prior decision, State v. Burton, 676 P.2d 975 (Wash. 1984), which had patterned its decision after federal law. Burton, 676 P.2d at 981. The Washington Supreme Court in State v. Brown, supra, recanted that earlier decision noting that, while their Evidence Rule 609(a) was also a verbatim replica of the federal

rule, Washington was free to interpret the language differently. In reaching this decision, the Court stated:

> [O]ur heavy reliance in Burton upon federal legislative history and upon federal decisional law was misguided. When we sought to resolve the "confusion and controversy" as to whether theft crimes are within ER 609(a)(2) by examining federal law, we lost sight of basic principles we generally employ in construing rules we have authored.
>
> First, of course, is the principle that federal case law interpreting the federal rule is not binding upon this court. Simply because our rule is identical to the federal rule does not require us to interpret our rule in the same fashion, nor could it require us to do so. . . .
>
> Second, we have grave reservations about whether the federal courts' restrictive construction of Rule 609(a)(2) to exclude per se admissibility of prior theft convictions is analytically sound. As we have noted, the federal courts place great weight on the definition accorded the phrase "dishonesty or false statement" found in federal legislative history. We think that in relying upon the congressional committee reports' definition, courts have overlooked the language of the rule itself. The rule is stated in the disjunctive, "dishonest or false statement." . . .
>
> Rather than concentrating on federal interpretation of the federal rule, we will examine the meaning of ER 609(a)(2) without using federal case law and federal legislative history as a starting point.

State v. Brown, ___ P.2d at ___ (emphasis added). The reasoning employed by the Washington Supreme Court to support its deviation from the federal law is contrary to Utah's stated position and is therefore inappropriate support under both stated reasons.

First, Utah, unlike Washington, expressed an intention from the outset of adopting the federal rules to seek uniformity with evidence law between the federal and Utah courts by explicitly

directing Utah courts to look to federal decisions for guidance. State v. Banner, 717 P.2d 1333-34 (citing State v. Gray, 717 P.2d 1313, 1317 (Utah 1986)); Preliminary Note, Utah Rules of Evidence (1983).

Second, the Washington Supreme Court, both in State v. Burton, supra, and State v. Brown, supra, conceded that the overwhelming federal position is that theft crimes are not crimes of dishonesty or false statement as meant by Rule 609(a)(2). Burton, 676 P.2d at 981; Brown, ___ P.2d at ___.

Accordingly, this Court should not deviate from the federal rules as did the Washington Supreme Court. This Court should find that theft is not a crime of dishonesty or false statement and that the trial court prejudicially erred in denying Mr. Brown's motion in limine to suppress the prior convictions. Mr. Brown's case should be reversed and remanded for a new trial where such prejudicial error does not occur.

POINT II

(Reply to Respondent's Points II and III)

MR. BROWN DID NOT RECEIVE A FAIR TRIAL BY AN IMPARTIAL JURY AS GUARANTEED HIM BY BOTH THE FEDERAL AND STATE CONSTITUTIONS.

At issue in both Points II and III of Appellant's opening brief and the State's answer is whether Mr. Brown received his constitutionally guaranteed fair trial by an impartial jury. Fifth, Sixth and Fourteenth Amendments, United States Constitution; Article I, Sections 7 and 12, Utah Constitution. The State answers

the issue in both points with claims that no error occurred, or that if error occurred it was harmless (Brief of Respondent at 9-22). The State further contends that Mr. Brown wasn't able to prove his assertions of error because the affidavits provided by his counsel were not established (Brief of Respondent at 10) and/or were actually stricken by the trial court (Brief of Respondent at 17). The State's position is without merit and must fail.

First, the trial court refused to allow an inquiry into the nature of the statements which prompted the jury to send out the question, "Does statements made by jurors during recess that disturbed some members render our verdict invalid?" (R. 87, 155 at 92). The trial court opted instead to merely admonish the jury to decide the case solely on the law and the evidence presented in court (R. 155 at 93). Such a belated admonition failed to protect Mr. Brown's right to an impartial jury.

Case law from the United States Supreme Court, the Utah Supreme Court, and this Court, disclose the error of the trial judge and mandate reversal of Mr. Brown's conviction.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness . . . . [T]o perform its high function in the best way "justice must satisfy the appearance of justice."

Estes v. Texas, 381 U.S. 532, 543 (1965)(citing in part Offutt v. United States, 348 U.S. 11, 14 (1955)).

> The right to a trial by an impartial jury lies at the very heart of due process. [O]ur common-law

> heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose--to provide a fair and reliable determination of guilt. [A]lthough a juror may be sincere when he says that he was fair and impartial to the defendant, the psychological impact requiring such a declaration before one's fellows is often its father. It is the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce.

Smith v. Phillips, 455 U.S. 209, 217 (1982)(citations and quotations omitted).

> The possibility that improper contacts may influence a juror in ways he or she may not even be able to recognize and that a defendant may be left with questions as to the impartiality of the jury, leads us to the conclusion that when the contact is more than incidental, the burden is on the prosecution to prove that the unauthorized contact did not influence the jury.
>
> . . . . .
>
> Indeed, even if the jurors had denied they were influenced by the encounter in the post-trial hearing, that is not enough to rebut the presumption of prejudice.

State v. Pike, 712 P.2d 277, 280-81 (Utah 1985).

> The Pike Court explained that "[a]nything more than the most incidental contact during the trial between witnesses and jurors casts doubt upon the impartiality of the jury and at best gives the appearance of the absence of impartiality." The Court stated that Utah has adopted a stringent rule that "prejudice may well exist even though a person who has been tainted may not himself, be able to recognize that fact." . . . The Court held [in Pike] the juror's denial of prejudice or influence was, therefore, insufficient to overcome the presumption, and the mistrial should have been granted.

State v. Larocco, 742 P.2d 89, 96 (Utah App. 1987)(quoting State v. Pike, 712 p.2d at 279-80).

Accordingly, prejudicial error occurred in Mr. Brown's case when the trial judge refused to conduct an inquiry into the statements which the jurors themselves found to be troubling enough to ask whether their decision would be valid.[1] That error was compounded when the trial judge denied the motion for a new trial which was supported by affidavits detailing the impermissible exchanges between jurors both before and during deliberations.[2] The prejudice revealed and appropriately presumed from the question by the jury and/or the statements made by Juror Hogan cannot be rebutted by reliance upon either the belated group admonition given by the trial judge in response to the jury's question (R. 155 at 93), nor the individual polling after pronouncement of the verdict (R. 155 at 96-97). See cases cited supra on this point.

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[1] Notably, in both State v. Pike, supra, and State v. Larocco, supra, the trial court held a hearing with the particular jurors and witnesses involved to determine what had occurred. Such a hearing was asked for and denied in the case at bar (R. 155 at 92-93); the presumption for prejudice should therefore stand unrebutted in this case. See State v. Pike, 712 P.2d at 280, seemingly requiring an exhaustive inquiry; see also State v. DeMille, 756 P.2d 81, 85-86 (Utah 1988)(Stewart, J., dissenting opinion).

[2] The affidavit of Juror Blain revealed (1) that Juror Hogan argued retail sales experience during deliberations when he had failed to acknowledge any such experience during voir dire, and (2) that statements derogatory to Mr. Brown had been exchanged between jurors before deliberations reflecting an attitude that Juror Hogan appeared to have predetermined Mr. Brown's guilt before the case had even been submitted to the jury (R. 138-39). Specifically, Juror Hogan had made a reference to the accused as "that black guy." He had also stated, "[S]he, [defense counsel], doesn't need to worry with that guy." At another point, he said, "Book 'em, Danno" in reference to Mr. Brown. (R. 156 at 7.) All these statements were understood by Juror Blain as indication that Juror Hogan had predetermined Mr. Brown's guilt.

Second, the State maintains the trial court correctly struck the affidavits from use at the motion for a new trial. At the State's urging the court relied on Rule 606(b) of the Utah Rules of Evidence to strike the affidavits. Under the circumstances of the case, that ruling by the trial court was erroneous. Rule 606(b) may not apply at all to the facts of this case, and even if it does apply, the affidavit presented to the trial court fits within the expressed exception to the rule.

As Rule 606(b) of the Utah Rules of Evidence is a verbatim replica of the federal rule, federal intent and case law guides the proper interpretation. See State v. Gray, 717 P.2d 1313 (Utah 1986); see also discussion in Point I, supra, at 2-6. The Conference Report to Rule 606(b) of the federal Rules of Evidence discusses both the House bill and Senate bill versions of the rule. The Conference Report then specifies:

> The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in properly reporting to the court misconduct that occurs during jury deliberations.

Various federal courts have held that Rule 606(b) does not bar the introduction of statements which demonstrate the failure of a juror to answer material voir dire questions. Hard v. Burlington Northern Railroad, 812 F.2d 482, 484-85 (9th Cir. 1987)(statements which tend to show deceit during voir dire are not barred by Rule 606(b) and the court below abused its discretion in so ruling and in failing to hold a hearing to investigate that a juror failed to honestly answer a material voir dire question); Maldonado v. Missouri Pacific

Railway Co., 798 F.2d 764, 769-70 (5th Cir. 1986)(no error was found because appellant did not allege that a juror failed to disclose important information during voir dire; giving false information or withholding information during voir dire is an exception to Rule 606(b)).

However, even if the rule does apply, the affidavits presented in this case fit within the exception articulated within the rule itself. The rule states:

> **Rule 606. Competency of juror as witness.**
>
> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Rule 606(b), Utah Rules of Evidence (1983)(emphasis added). In this case Juror Hogan did not respond to any of the trial court's six different questions of whether the jurors had worked directly or indirectly in the retail sales business (R. 155 at 36-38). Juror Hogan then, however, argued to his fellow jurors by referring during deliberations to his prior employment in retail sales (R. 139).

As the crime charged against Mr. Brown was retail theft, the questions asked Juror Hogan were material. If he had answered the questions properly, Juror Hogan would have been subjected to follow-up questions and inquiries aimed at revealing any bias he may have had. When Juror Hogan failed to answer the questions but then utilized that experience to support his position in deliberations he frustrated the purpose of voir dire precluding possible challenges for cause or peremptory challenges. Any use of the information undisclosed to the court and counsel during voir dire is therefore extraneous information. See Hard v. Burlington Northern Railroad, supra; and Maldonado v. Missouri Pacific Railway Co., supra. The statements of prior retail experiences by Juror Hogan in deliberations were improperly before the other jurors. Juror Blain recognized the inconsistency, and this Court should also conclude that Juror Hogan's arguments in deliberations were improperly before the jury, were prejudicial to Mr. Brown, and were extraneous as meant by the rule. Moreover, the action of Juror Hogan violated Mr. Brown's due process rights and his right to an impartial jury guaranteed by the federal and state constitutions.[3]

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[3] The case at bar is distinct from State v. DeMille, 756 P.2d 81 (Utah 1988), where the accused claimed error because jurors relied on personal experiences. In DeMille counsel for the accused declined to ask about such personal experiences which the Court characterized as "quite foreseeable." 756 P.2d at 83. In the case at bar the "quite foreseeable" inquiry at issue was asked of prospective jurors. Juror Hogan failed to answer that question (repeated six times) consistently with his deliberation statements. The implication of DeMille is that had the question been asked there and events proceeded as in this case error would have occurred. Id.

The affidavit of Juror Blain fits within the exception of Rule 606(b) and should have been accepted by the trial court. A ruling by this Court to the contrary subjects Rule 606(b) to an unconstitutional as applied challenge inasmuch as the rule must give way and fall when balanced against the constitutional rights, both federal and state, of Mr. Brown to due process and a fair trial by an impartial jury. This Court should accept the affidavits as admissible and probative evidence supporting the rebuttable presumption that Mr. Brown was prejudiced because he did not receive his fair trial at the hands of an impartial jury.

Finally, the State contends that even if any errors occurred in this trial they were harmless because of the strength of the case against Mr. Brown. Brief of Respondent at 16-22. That claim is untenable on the facts of this case. The doctrine of harmless error, as provided in case law, is at its most stringent when examining violations of constitutional dimensions. Justice Zimmerman in his concurring opinion in State v. Bishop, 753 P.2d 439 (Utah 1988), noted:

> This Court has yet to squarely decide whether the harmless error standard applicable to violations of the state constitution is the erosion of confidence standard or the stricter federal "harmless beyond a reasonable doubt" standard.

Id. at 500 (Zimmerman, J., concurring in result)(citing State v. Hackford, 737 P.2d 200, 204-05 & n.3 (Utah 1987)). Either standard adopted in Utah would require a finding that the errors herein were not harmless.

The facts of this case go much beyond the evidentiary errors discussed in State v. Hackford, 737 P.2d 200 (Utah 1987)(trial court erred in limiting defendant's cross-examination by misinterpreting rule of evidence but error was harmless); State v. Knight, 734 P.2d 913 (Utah 1987)(the State committed reversible error by failing to provide requested discovery of two witnesses who gave unanticipated testimony); or State v. Rammel, 721 P.2d 498 (Utah 1986)(trial court erred in limiting cross examination for bias but error was harmless because jury was already aware of such bias). In this case, the errors are more than otherwise inadmissible evidence reaching the jury or evidence improperly excluded from the jury; the errors which occurred in this case go to the heart of Mr. Brown's constitutional rights to a fair trial by impartial jurors. See Chapman v. California, 386 U.S. 18, 23 & n.8 (1967)(citing cases indicating that some constitutional rights are so fundamental that their infraction can never be harmless error).

Predeliberation statements such as "[S]he [defense counsel] doesn't need to worry with that guy," "that black guy," and "book'em Danno," heard and interpreted by other jurors as a predetermination of Mr. Brown's guilt, cannot be said to fail to erode the confidence in the verdict. Even if somehow those statements could fail to erode the confidence of this Court in the verdict below surely under the federal constitution's more stringent test, the State would be unable to show that the error was harmless beyond a reasonable doubt. See Chapman v. California, 386 U.S. at 23-25.

Mr. Brown was denied his state and federal constitutional rights to testify in his own behalf; he was denied his state's federal constitutional rights to a fair trial by an impartial jury. These errors mandate that this Court reverse the conviction of Mr. Brown and remand the case for a new trial absent such constitutional errors.

CONCLUSION

For all or any of the foregoing reasons, as well as those articulated in the opening brief, Mr. Brown respectfully requests that this Court grant his appeal, reverse his conviction, and remand to the trial court for a new trial.

RESPECTFULLY submitted this 20th day of October, 1988.

FRANCES M. PALACIOS
Attorney for Defendant/Appellant

JOAN C. WATT
Attorney for Defendant/Appellant

RICHARD G. UDAY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, JOAN C. WATT, hereby certify that eight copies of the foregoing will be delivered to the Utah Court of Appeals, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 20th day of October, 1988.

Joan C. Watt

JOAN C. WATT

DELIVERED by _____ this _____ day of October, 1988.

_____